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No. 83-276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, et al.,
Appellants,

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, et al.,
Appellees.

SELECTIVE SERVICE SYSTEM, et al.,
Appellants,

v.

BRADLEY BOE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

AMICUS BRIEF OF THE UNIVERSITY OF MINNESOTA, MACALESTER COLLEGE, WAYNE STATE UNIVERSITY

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This amicus brief is submitted by the University of Minnesota, Macalester College, St. Paul, Minnesota, and Wayne State University, Detroit, Michigan, in support of the position of appellees set forth in their Motion to Affirm. The parties to this appeal have consented to the filing of this amicus brief.

The amici are all well known institutions of higher education which have a substantial interest in the outcome of this litigation. Each of the schools disburses substantial sums of financial aid to large numbers of students who are affected by the requirements of Section 1113 of the Department of Defense Authorization Act of 1983, Pub.L.No. 97-252, 96 Stat. 748.

All of the amici object to the requirements of Section 1113 as an unconstitutional attempt to enforce the draft registration laws through financial aid programs. The two statutory schemes have no common purpose and the imposition of one statutory scheme on the other interferes with the constitutional rights of the students that amici were created to serve. Accordingly, the amici file this brief to make the Court aware of their views and to urge the Court either to summarily affirm the decision of the district court or to note probable jurisdiction and fully review the questions presented.

The University of Minnesota is the largest public institution of higher education in the State of Minnesota. It serves over 45,000 students on five campuses with major centers located in Minneapolis and St. Paul. Affidavit of Robert Misenko, Director of Student Financial Aid, at para 4. Each year, approximately $55,000,000 in financial aid subject to Title IV of the Higher Education Act and now Section 1113 is distributed to about 20,000 students. *Id.*

Macalester College is a private liberal arts college located in St. Paul, Minnesota, serving over 1,500 students from 49 states. In 1982-83, Macalester will distribute over $1.5 million in financial aid under Title IV. Affidavit of Matthew Entenza, President, Macalester Community Council, at para 3.

Wayne State University is a major public university—one of the three constitutionally autonomous universities provided for by the Michigan constitution. It is located in Detroit and serves a predominately urban student population of 32,000, 53% of whom receive financial aid. Each year approximately twenty-one million dollars in financial aid subject to Title IV of the Higher Education Act, and now to Section 1113, is distributed to about 15,000 students.

All of the schools represented by this brief are institutions of higher education that are subject to and responsible for the implementation of Section 1113 of the Department of Defense Authorization Act of 1983. This Act and its implementing rules require each student applying for assistance under Title IV of the Higher Education Act of 1965, 20 USC § 1070 et seq. to demonstrate compliance with the draft registration laws if applicable. Since Title IV assistance is almost exclusively administered and distributed by institutions of higher education, it is left to the schools to enforce this requirement and to deny assistance if it is not met. The regulatory structure and the practicalities of financial aid distribution place schools squarely in the role of enforcing Section 1113 and consequently the draft registration laws.

While the role of enforcement is always uncomfortable, it is particularly unwelcome here where the enforcement with respect to the controversial requirement of registration is accomplished in a manner that infringes on the constitutional rights of the students. There are already independent criminal sanctions for violation of the draft laws which are being enforced.

As the district court has found, this attempt to avoid the criminal trial process results in violations of the constitutional protections against bills of attainder and the protections of the fifth amendment. Institutions of higher education should not be made the unwilling enforcers of such an unconstitutional scheme.

From a broader perspective, the lack of common purpose behind the draft registration laws and financial aid programs breeds even more difficulties when they are enforced together. The financial aid programs distribute funds to students primarily on the basis of need and financial capability. These distinctions are fair and fully justified in the context of the goals and purposes of financial aid distribution.

However, when the financial aid process becomes the vehicle for enforcement of the draft laws, the distinctions become discriminatory and unjustifiable. For example, while the discrimination between male and female may be justified for purposes of draft registration, this sex-based distinction is absolutely unrelated to or unjustified by the purposes of the financial aid laws. Moreover, since financial aid is distributed based on need and capability, the vast majority of the aid goes to the poor and middle class. Section 1113 as enforced by the financial aid process will discriminatorily enforce the draft registration requirement against the poor and middle classes which also tend to be disproportionately composed of minorities.

In the view of amici, Section 1113 is unconstitutional and involves the amici in those constitutional violations. Amici believe the well reasoned opinion of the district court judge, the Honorable Donald D. Alsop, is a correct statement of the law on both the bill of attainder and fifth amendment issues. The district court's judgment should be summarily affirmed.

Amici agree with Appellants, however, that the questions are substantial in the sense that they have major impacts on large numbers of students seeking higher education and upon the educational institutions providing that education. Thousands of students and millions of dollars will be affected each year. The imposition of unconstitutional requirements through higher educational institutions is certainly a substantial question.

Finally, if this Court notes probable jurisdiction and grants full review, amici suggest that the Court also consider two additional questions which arise from Section 1113 and were presented to the District Court. These are:

1) Whether Section 1113 violates the Equal Protection Requirements of the Fifth Amendment by Unlawfully Discriminating based on Gender;

2) Whether Section 1113 violates the Equal Protection Requirements of the Fifth Amendment by Unlawfully Discriminating based on Wealth.

As previously indicated, both of these issues arise from the overlay of Section 1113 on the financial aid programs. Their resolution at this time is not only appropriate but useful to all parties to this litigation.

Respectfully submitted,

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